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No. 770

IN THE

Supreme Court of the United States

JANUARY TERM, A. D. 1963.

BERNICE WISE,

Petitioner,

vs.

CITY OF CHICAGO, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BERNICE WISE pro se
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The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinions below	2
Jurisdiction	2
Questions presented	2, 3, 4, 5
Statement	7
Reasons for Granting Writ	14
Conclusion	29

CITATIONS.

Cases:

Amos v. Prom Inc., 115 F. Supp. 72	17
Barnes Coal Corp. v. Retail Coal Merchants Assn. 128 F. 2d 645	24
Bowles v. Farmers National Bank, 147 F. 2d 425	24
Davis v. Johnson, 138 F. Supp. 572	24
Ginsburg v. Stern, 242 F. 2d 379	17
Hamilton Knowlton v. Hartford Conn., 26 F. Supp. 292	20
Kelly v. Delaware River Land Comm., 72 S. Ct. 25	17
Lewis v. Braughtigan, 227 F. 2d 124; 55 2d A.L.R. 505	26
Long v. Union Pacific Railroad Co., 206 F. 2d 829	27
L. B. Wilson Inc. v. Federal Communications Comm., 170 F. 2d 793	21
Monroe v. Pape, 365 U.S. 167	24
Ohio Cas. Ins. Co. v. Farmers Bank of Clay County, Ky. 178 F. 2d 510	17

PAGE

Orange Theater Corp. v. Rayherst Amusement Corp., 2 F.R.D. 278 20

Park In Theaters v. Paramount Richards Theaters, 9 F.R.D. 267 17

Peckham v. Scanlon, 241 F. 2d 761 16

Peterson Steels Inc. v. Seidman, 188 F. 2d 193 17

Rogers v. Girad Trust Co., 159 F. 2d 239 16

Ropey v. Day and Zimmerman, 67 S. Ct. 1082 27

Rosenberg v. Baum, 153 F. 2d 10 20

Screws v. United States, 325 U.S. 91 24

Stift v. Lynch, 267 F. 2d 237 26

United States v. Classic, 313 U.S. 299 24

Williams v. United States, 341 U.S. 97 24

Statutes:

R. S. 1979 42 U.S.C.A. Section 1983 .....7, 11, 23

Illinois Revised Statutes Chapter 110 Sections 76 (2) 68 & 82 .....8, 9, 21, 22

28 U.S.C.A. Rules 7 & 15 .....12, 13, 16, 18

Constitutional Provision

5th Amendment to the Constitution of the United States 14, 15, 18

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner Bernice Wise, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered 1962, and is not reported but appears in the record filed with the Clerk of the Court of Appeals and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed October 1962, and is not yet reported but is set forth in the appendix hereto and in the certified copy of the record.

JURISDICTION.

On October 26, 1962, it was ordered that the petition for rehearing be denied. (These orders appear in the appendix.) This petition is filed within 90 days of the denial of the petition for rehearing in the United States Circuit Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 62 Stat. 928.

QUESTIONS PRESENTED.

1. Where Rule 15, 28 U.S.C.A. Federal Rules of Civil Procedure provides in material part, that "a party may amend his pleading once as a matter of course at any time before a responsive pleading is served" and no responsive pleading has been served by respondents to, and including the pendency of this petition, is it a violation of the Due Process Clause of the Constitution of the United States, and reversible error to make the absolute right to amend once before the filing of a responsible pleading, a conditional right that the petitioner could avail herself of ONLY at the discretion, prior approval, and satisfaction and within arbitrary and unreasonable limitations imposed, by the following affirmative actions: (a)

Directing that petitioner's motion to amend once, under provisions of Rule 15, be temporarily withdrawn, upon penalty that it would positively be denied unless withdrawn as directed. (b) When petitioner's motion was renewed at the time specified, taking the motion under advisement, directing the petitioner to draft and submit a proposed amended complaint for prior examination and satisfaction, with the condition that if the proposed amended complaint met with prior satisfaction and approval, leave would be granted, otherwise leave would be denied. (c) Imposing an arbitrary and unreasonable five (5) day limitation to draft proposed amended complaint over strenuous objections. (d) Entering orders denying leave to amend and dismissing suit. (e) During hearing on petitioner's motion to vacate order denying leave to amend, simultaneously with order to vacate, entered further orders, on same document, striking the proposed amended complaint, not only without it having ever been filed by petitioner, but without allowing time or opportunity to do so, and further order dismissing suit.

2. Was it reversible error, and in violation of the Due Process Clause of the 5th Amendment to the Constitution of the United States for the judge of the United States District Court to disregard, waive or suspend the requirements of Rule 7 of the Federal Rules of Civil Procedure (28 U.S.C.A.) that motions be in writing, written notice served on the opposing party not later than 4:00 P.M. of the day, preceding the day the Motion is to be made, that all motions state with particularity the ground therefor, and hearing on contested motion; by, during the hearing on the petitioner's motion to vacate order denying leave to amend under Rule 15, without any agreement or stipulation by petitioner to allow the respondents to make three (3) Surprise Oral Motions without any notice and without stating any reason or ground whatsoever: (1) To let the

defendants' brief filed to the Complaint to stand to the proposed amended complaint; (2) To strike the proposed amended complaint (never filed by petitioner); (3) To dismiss the suit; and to automatically sustain all three surprise oral motions without any hearing whatsoever, and then interrupt and abruptly terminate objections petitioner's attorney was in the process of stating to the procedure?

3. Where a complaint and proposed amended complaint, alleges and sets out facts to show, that an assistant corporation counsel for the City of Chicago, with full knowledge that the petitioner's intestate had appealed a $1,000.00 fine, levied by the Municipal Court of Chicago to the Illinois Appellate Court, which had exclusive jurisdiction; that the Municipal Court not only was entirely without jurisdiction, by operation of law after expiration of 30 days, but EXPRESSLY PROHIBITED BY LAW from taking any steps or action in the case after perfection of the said appeal (Illinois Revised Statutes 1961 Chapter 110 Section 76 (2)).

That at the time said appeal had been perfected, there was no judgment or order by the Trial Court for body execution, *capias* or for the issuance of order for warrant, arrest and commitment of the petitioner's intestate to prison to enforce payment of $1,000.00 fine; that these facts and provisions of said statute was specifically pointed out to the said assistant corporation counsel and Trial Court on a prior attempt by assistant corporation counsel to procure order for imprisonment of decedent, and the Court conceded lack of jurisdiction, and expressly stated that motion for this action would not be considered; that notwithstanding the foregoing, the said assistant corporation counsel, determined and intending to bring about the imprisonment of said decedent, maliciously, fraudulently and secretly went into the transcript room, procured the files, which were being prepared for transmission to

Illinois Appellate Court, PRIVATELY went back to the Trial Court Judge, ORALLY requested and PERSUADED him to enter a VOID and UNCONSTITUTIONAL ORDER for warrant, arrest and commitment of petitioner's deceased husband to prison, without Notice to, or the knowledge of the decedent or his attorney; that knowing the said order to be VOID and without any legal effect, nevertheless, further and secretly procured writ based on said void order, directed bailiffs of the Municipal Court, who went to the home of petitioner's deceased husband, who was a helpless invalid as a result of a near fatal "hit and run" automobile accident, brutally and needlessly literally dragged him from his sick bed, forced and dragged him to a waiting automobile, minus his crutches, rupturing, inflicting and aggravating injuries so severe that after he underwent an ordeal of inhuman suffering and excruciating pain and agony until he became delirious, sank into a coma, and died shortly after imprisonment, despite an emergency operation in a desperate effort to save his life; that the Corporation Counsel, with full knowledge of the corrupt and unlawful acts of his said assistant corporation counsel, and having been fully informed of the desperate physical plight of said decedent and probability of an early death, unless released, nevertheless, ratified and approved the conduct of his said assistant, then threw the full weight, power and prestige of the City of Chicago, the Corporation Counsel's Office and directed a bitter and relentless fight to prevent the approval of the application for *supersedeas* filed in the said Appellate Court, pursuant to Illinois Statute, until the tragic death of petitioner's deceased husband in prison under circumstances aforesaid; that the violent seizure, physical abuse, arrest and imprisonment of petitioner's deceased husband was not only without due process of law, but WITHOUT ANY LAWFUL OR AUTHORIZED

PROCESS OF LAW WHATSOEVER, and by malicious and fraudulent conduct of said assistant corporation counsel, aided and abetted by corporation counsel, OUTSIDE THE DISCHARGE OF THEIR OFFICIAL DUTIES: was it error for the District Court to sustain a motion to dismiss; rule that neither the complaint nor proposed amended complaint stated a claim upon which relief could be granted; and dismissed the suit?

4. Where a prosecutor who, knowing that a case from a Trial Court is on appeal to an Appellate Court, that the jurisdiction of the Trial Court has been terminated and that further procedure, action or steps by the Trial Court is prohibited by law, nevertheless secretly and privately goes to the trial judge, procures the entry of a void judgment or order, and knowing the judgment or order to be void, intentionally uses said void order to bring about the violent seizure, arrest and imprisonment of a citizen of the United States or other person resulting in death in prison, is such prosecutor immune from civil action, more particularly under Title 42 U.S.C.A., Section 1983, or other Federal Civil rights statutes SOLELY by reason of his status or position as a prosecutor?

5. Where the petitioner, in her appeal from the judgment of the United States District Court, dismissing her suit, had based her appeal primarily on, and had specifically raised as an issue, on appeal, that she had been denied due process of law, as guaranteed by the 5th Amendment to the Constitution of the United States, in the District Court below, can the United States, Circuit Court of Appeals below, affirm the judgment of the Court below, ON ANY BASIS WHATSOEVER, without reaching, deciding or by disregarding the constitutional issue raised, of whether the petitioner had been denied due process of law, in the District Court below?

STATEMENT OF THE CASE.

This suit is based primarily upon Title 42 U.S.C.A., Section 1983, and partly upon Title 28 U.S.C.A., Section 1343, which are popularly known as the "Federal Civil Rights Act," which gives the United States District Court ORIGINAL JURISDICTION of any civil action to recover damages for deprivation of Civil Rights, or more particularly, provides a civil remedy for persons injured in their rights under the Federal Constitution, which the cases hold includes the administration person, etc.

This suit was brought by BERNICE WISE, widow and administratrix of ARTHUR WISE, deceased, against the City of Chicago, a Municipal Corporation, JOHN MELANIPHY, Corporation Counsel, and SOL M. GLICK, assistant corporation counsel for the City of Chicago, alleging that her deceased husband, ARTHUR WISE, had been illegally and unconstitutionally imprisoned, fatally injured, his business destroyed and his agonizing and tragic death in prison was the direct result of intentional, wrongful and malicious actions and conduct of the respondents, OUTSIDE THE DISCHARGE OF THEIR OFFICIAL DUTIES. The complaint, and a PROPOSED amended complaint, filed in the United States District Court, for the Northern District of Illinois, Eastern Division, alleged that the plaintiff's intestate and deceased husband, ARTHUR WISE, a semi-illiterate Negro, who could barely write his own name, having been fined $1,000.00 by Judge Casimer Cwiklinski, of the Municipal Court of Chicago on charges of alleged Building Code violation, had appealed the case to the Illinois Appellate Court. That the said appeal was based on the ground that the said Municipal Court Judge Cwiklinski had unreasonably, arbitrarily and unconstitutionally denied him the right and opportunity of BEING REPRESENTED BY

COUNSEL, and without notice, and OVER HIS STRENUOUS OBJECTIONS, forced him to trial without a lawyer, he was able, willing and ready to retain, and then refused to grant him even a few hours to procure his contractor and other competent witnesses to prove that the alleged building code violations had been fully corrected before the time the petitioner's said intestate perfected his appeal to the Illinois Appellate Court, from the $1,000.00 fine imposed by the Trial Court, there was no judgment or order by said Trial Court for *capias*, body execution, or any other primitive orders to enforce collection of said fine.

Prior to said appeal, the said ARTHUR WISE was the victim of a "hit and run" automobile accident, sustaining permanent and almost fatal injuries, rendering him a helpless and pathetic invalid.

The said ARTHUR WISE elected to, and IN FACT DID MAKE APPLICATION FOR A SUPERSEDEAS in the Illinois Appellate Court, under provisions of the Illinois Civil Practice Act, Ill. Rev. Stat. Ch. 110, Sec. 82.

More than 60 DAYS AFTER ENTRY OF FINAL ORDER by said Trial Court, and after an appeal had been perfected to said Illinois Appellate Court, SOL M. GLICK, assistant corporation counsel for the City of Chicago, went before the TRIAL COURT on an ORAL MOTION for the entry of JUDGMENT for a body execution, and the further entry of ORDERS by said TRIAL COURT for issuance of warrant, arrest and commitment of said ARTHUR WISE to prison. DAVID S. MINOR, attorney for Wise in his said appeal before the Illinois Appellate Court, appeared before the Trial Court, in his behalf, and challenged the jurisdiction of the Trial Court, pointing out to the Honorable Casimer Cwiklinski, said Judge of said Municipal Court of Chicago, (a) That the

case was on appeal to the Illinois Appellate Court, which had EXCLUSIVE JURISDICTION, and that this was a matter of record and fully known by the said Assistant Corporation Counsel; (b) That Municipal Court rules and section 68 of the Illinois Civil Practice Act, limits the jurisdiction of the Trial Court to 30 days after entry of final judgment, or orders, and requires all post trial motions to be made within 30 days after entry of final judgment, (c) That Illinois Appellate Court rules, more particularly Section 76(2) of the Illinois Civil Practice expressly excluded the Trial Court from jurisdiction to take any steps, conduct any hearing or enter any orders after an appeal has been perfected, without regard to the 30-day limitation.

That the said Trial Court Judge conceded lack of jurisdiction on these basis, and expressly stated in open court, that because he was unable to verify lack of jurisdiction on the grounds set out by said attorney, the Court would not consider or hear the motion of the assistant corporation counsel for entry of judgment for body execution and entry of orders for warrant, arrest and commitment of said ARTHUR WISE, AND directed the Court Clerk to call the next case.

The said respondent, SOL M. GLICK, having been frustrated by this jurisdictional bar to imprisonment of the decedent, ARTHUR WISE, waited until WISE'S attorney had left the Court Room, in reliance upon the assurance of the Trial Judge that the motion would not be considered or heard, secretly went in to the transcript room, where the files of the case was being prepared for dispatch to the Illinois Appellate Court, wrongfully procured said files, PRIVATELY went to the said Judge Cwiklinski, orally requested, and persuaded him to enter a void and unconstitutional order for warrant, arrest and commitment of said ARTHUR WISE to prison, notwithstanding that said record showed on its face that the case

was on appeal and the Court was entirely without jurisdiction to enter any kind of order.

Pursuant to said void and fraudulently procured Court order, the said assistant corporation counsel SOL M. GLICK secretly processed a writ to Bailiffs of the said Municipal Court, who went to the home of the plaintiff's intestate, ignored and disregarded the fact that the said ARTHUR WISE was an invalid and bed-ridden from the near fatal "hit and run" accident, brutally, savagely and violently seized and literally dragged the said ARTHUR WISE from his sick bed, rupturing him in the process, disregarding the agonizing screams and pleas of his family, dragged him to a vehicle, minus his crutches, delivered him to the "House of Correction," a penal institution, where he underwent excruciating pain, agony and inhuman suffering until he became delirious, sank into a coma until death mercifully came to his rescue as he died without regaining consciousness, despite an emergency brain operation, in a desperate effort to save his life, a short time after his said unconstitutional arrest, detention and imprisonment without due process, or any lawful or authorized process of law whatsoever.

After the arrest and imprisonment of the petitioner's intestate, in the manner aforesaid, the defendant, JOHN MELANIPHY, Corporation Counsel for the City of Chicago, with full knowledge of the corrupt, unlawful and unconstitutional manner in which the petitioner's intestate had been deprived of his liberty, and having been fully informed of his desperate physical plight, and inhuman suffering, and the probability that he would not live to see the Appellate Court rule on his appeal, nevertheless, approved GLICK'S conduct, directed and threw the full weight, power, prestige and resources of the City of Chicago and Corporation Counsel's Office in a bitter, relentless, and uncompromising fight to prevent approval of a *supersedeas* by the Illinois Appellate Court and to per-

petuate the said deprivation of liberty of a semi-illiterate Negro who could barely write his own name, until his tragic death as above described, and whose only crime was that he was poor, humble and a Negro.

FACTS IN THE CASE MATERIAL TO THE QUESTIONS PRESENTED, AND STATEMENT OF THE MANNER IN WHICH CONSTITUTIONAL QUESTIONS, SOUGHT TO BE REVIEWED WERE RAISED.

The petitioner filed her original complaint under Title 42 U.S.C.A., Section 1983. The respondents filed a motion to dismiss with brief alleging that the complaint failed to state a claim upon which relief could be granted; petitioner filed answer brief. The respondents did not, and to, and including, this petition for writ of *certiorari*, have not filed any responsive pleading whatsoever. Prior to the ruling on respondents' motion to dismiss, petitioner moved the Court for leave to amend as a matter of course under Rule 15 of the Federal Rules of Civil Procedure. The Court directed that the motion be withdrawn until the ruling on respondents' motion, the Court stating that unless the motion was withdrawn as directed, it would positively be denied. The petitioner complied with the Court's direction and withdrew the motion for leave to amend.

On November 24, 1961, the Honorable Julius J. Hoffman, Judge of the United States District Court, before whom the case was pending, sustained the respondents' motion to dismiss, on the ground that the complaint failed to state a claim upon which relief could be granted, and dismissed the cause. On December 4, 1961, the petitioner again moved the Court for leave to amend as a matter of course, under said Rule 15. The Court took the motion under advisement, directed the petitioner to prepare and submit to the Court, for its examination, a proposed amended complaint, with the condition that if the pro-

posed amended complaint met with the approval of the Court, leave to amend would be granted, if it did not, leave would be denied. The Court then, over the strenuous objections of petitioner's attorney, arbitrarily imposed a five-day limitation for the preparation and submitting to the Court of a proposed amended complaint, disregarding the petitioner's attorney's plea that he was already engaged in an extensive jury trial, had a Master in Chancery hearing and other emergency matters pending, requiring immediate attention so that he would be unable to draft an adequate proposed amended complaint within such unreasonable period. The Court ruled that only five days would be allowed to prepare and submit proposed amended complaint. A desperate effort was made to comply with this ruling of the Court and a hastily drawn proposed amended complaint was submitted within the imposed five day limit for the Court to examine December 12, 1961. The following day, December 13, 1961, the Court entered an order denying leave to amend (App. 53).

The petitioner moved the Court to vacate order denying leave to amend with supporting brief (App. 55-57), citing Rule 15 of Federal Rules of Civil Procedure and citing numerous cases holding that the right to amend once before the filing of a responsive pleading to be an ABSOLUTE RIGHT, that was REVERSIBLE ERROR TO BE DENIED (emphasis provided). Respondents failed to file answer brief. During the hearing on petitioner's said motion to vacate, counsels for respondents took the petitioner by surprise by simultaneously making THREE ORAL MOTIONS without notice or consent: (1) To let respondents' motion and brief filed to the original complaint stand to the proposed amended complaint; (2) To strike the proposed amended complaint (which the Court had denied leave and had not yet vacated its order); (3) To dismiss the suit. The Court AUTOMATICALLY SUSTAINED ALL three surprise oral motions, without any

hearing whatsoever, expressly stating, "THAT WILL BE THE ORDER" (App. 76), and without the respondents giving, or being required to give any reason or ground for either or all said oral motions. The petitioner's counsel started a vigorous objection to this procedure, but did not get an opportunity to finish when the Court abruptly cut off and terminated the objection with the statement, "I will sign the order" (App. 79-80). The court directed respondents' counsels to draw up, and simultaneously entered, on one document, a series of orders (a) vacating order denying leave to amend, (b) granting leave to amend, (c) sustaining respondents' oral motion to let motion and brief filed to original complaint to stand to proposed amended complaint, (d) sustaining respondents' oral motion to strike the proposed amended complaint, (e) sustaining respondents' oral motion to dismiss and order dismissing suit, notwithstanding that the only motion and hearing before the Court at the time was the petitioner's motion to vacate order denying leave to amend entered in violation of said Rule 15. The petitioner never filed, nor was given any opportunity to file proposed amended complaint. Petitioner, on appeal ordered a complete record which when prepared, certified and filed did not include proposed amended complaint. During oral argument before the United States Circuit Court of Appeals, counsel for petitioner learned for the first time that it had been later sent to the Clerk of said Circuit Court of Appeals, as a supplement to the record. Counsel for respondents ADMITTED AT ORAL ARGUMENT that, after the complete record had been filed on appeal, that he TELEPHONED the Clerk of the District Court and REQUESTED that he send petitioner's proposed amended complaint as a supplement to the record on appeal WITHOUT asking or receiving leave of Court, and WITHOUT NOTICE OR KNOWLEDGE OF PETITIONER'S ATTORNEY.

REASONS FOR THE ALLOWANCE OF WRIT OF CERTIORARI

The importance of this case lies in the fact that it set a potentially dangerous precedent, and presents important and fundamental Federal Constitutional questions that go to the very heart and essence of the "due process of law" clause of the 5th Amendment to the Constitution of the United States, which, unless settled by this Court, would be almost certain to lead to such widespread abuses and deprivations of due process, in reliance on the decision and doctrine established by the decision of this case, that would be certain to require repudiation by this Court in the future. The important constitutional questions raised by this case are: (a) Does the "due process of law" clause of the 5th Amendment to the Constitution of the United States, confer ABSOLUTE RIGHT and MANDATORY REQUIREMENTS in all judicial proceedings that cannot be arbitrarily waived, suspended, disregarded, qualified or made subject to the discretion of the Trial Court on any basis whatsoever? (b) Is it a violation of the due process clause of the Constitution of the United States for the Trial Court to waive, suspend or disregard the requirements of the Federal Rules of Civil Procedure. (c) Where the petitioner, in her appeal from the judgment of the District Court, had based her appeal primarily on, and specifically raised the constitutional question of "denial of due process of law as guaranteed by the 5th Amendment to the Constitution of the United States, as an issue, was it error, and itself a violation of said Constitutional provision (due process) for the United States Circuit Court of Appeals for the seventh Circuit, to affirm the judgment ON ANY BASIS WHATSOEVER, without reaching

ruling on and deciding the constitutional issue raised on appeal, of whether the plaintiff had been denied due process of law in the proceedings in the District Court below?

The Court of Appeals below in affirming judgment of the District Court below, completely disregarded and failed to decide the fundamental constitutional question of denial of due process of law in the proceedings in the District Court. In a decision, without precedent, and contrary to every applicable decision of this Court, the Court of Appeals below, on page 5 of its opinion expressly held that the basis upon which the judgment of the District Court was affirmed, rendered it unnecessary to reach or decide the constitutional issue raised by petitioner of denial of Due Process of Law in the District Court. By affirming the judgment notwithstanding arbitrary denial of Due Process of Law and disregard for and suspension of Federal Rules of Civil Procedure, the Court of Appeals has sanctioned such a revolutionary departure from the accepted and usual course of judicial proceedings by a lower court as to call for the exercise of this Court's supervision. The dangers of abuses are great and the abuses are well exhibited in the instant case. The Due Process Clause of the 5th Amendment to the Constitution of the United States leaves no room for interpretation, other than that it confers absolute right and mandatory requirement in all judicial proceedings that cannot be disregarded, evaded, waived or made subject to any discretion on the part of lower Courts. This Court should issue its writ in order to review this case and upon review, to determine the issues in favor of the petitioner, for the purpose of reaffirming the fundamental principle that, in a Democracy, the end, can NEVER JUSTIFY the means, that the means by which a judg-

ment is reached are FAR MORE IMPORTANT than the judgment itself.

I.

The complaint, in substance, alleged that the petitioner's deceased husband, Arthur Wise, had been illegally and unconstitutionally seized, arrested, imprisoned, brutally and fatally injured, his business destroyed and his agonizing and tragic death in prison, was the direct result of intentional and malicious actions and conduct of the respondents, OUTSIDE THE DISCHARGE OF THEIR OFFICIAL DUTIES (Emphasis supplied).

First and foremost, to the date of this petition before this petition before this United States Supreme Court, no responsive pleading has been filed or served by the respondents herein, who relied solely and exclusively upon a motion to dismiss. Rule 15, of the Federal Rules of Civil Procedure 28 U.S.C.A. specifically sets out, in material part, "a party may amend his pleading once as a matter of course at any time before a responsive pleading is served. *Peckham* v. *Scanlon*, 241 F. 2d 761 holds, This rule that a party may amend his pleadings once, as a matter of course at any time before service of a responsive pleading confers absolute right of which HE CANNOT BE DEPRIVED" same case held, "District Court's dismissal of action for want of prosecution, before filing of a responsive pleading by defendants was REVERSIBLE ERROR as denying plaintiff the right under this rule to amend complaint, though it stated no cause of action and even if there was no possibility that a cause could be stated". (Emphasis supplied) *Rogers* v. *Girard Trust Company*, 159 F. 2d 239 holds, "where defendant had filed no responsive pleading to complaint, plaintiff was entitled to amend as a matter of course and though leave

of Court was not necessary; it was error to deny leave when asked". The Court further stated, "a contrary interpretation would amount to emasculation of Rule 15 (a) It would require repudiation in the future." *Peterson Steels Inc.* v. *Seidman*, 188 F. 2d 193, *Park in Theaters* v. *Paramount Richards Theaters*, 9 F.R.D.; *Ohio Cas. Ins. Co.* v. *Farmers Bank of Clay County, Kentucky*, 178 F. 2d 510 and others too numerous to mention concur in holding the positive language of Rule 15(A) leaves no room for interpretation or construction other than that it confers absolute right of which the pleader cannot be deprived. The following cases are in agreement that a motion to dismiss or for summary judgment, are not responsive pleadings, within the meaning of said Rule 15: *Kelly* v. *Delaware River Land Comm.*, 187 F. 2d 93 72 S. Ct, 25; *Ohio Casualty Insurance Co.* v. *Farmers Bank of Clay County Ky.*, 178 F. 2d 510, *Ginsburg* v. *Stern*, 242 F. 2d 379, *Amos* v. *Prom Inc.*, 115 F. Supp. 127 and others.

In the case at bar the District Court arbitrarily hindered, limited and restricted the petitioner in her attempt to amend once as a matter of course under Rule 15, and converted the absolute right, conferred by said rule into a conditional right that could be exercised ONLY at the discretion and in the manner directed by the Court: The Court first directed that motion for leave to amend be withdrawn on penalty of being denied (App. 57, 67 and 75). When the motion was renewed at time specified by the Court, the Court took the motion under advisement, directed petitioner, as a condition precedent, to draft and submit a proposed amended complaint for prior study and examination by the Court, with the condition that if the Court was satisfied, leave to amend would be granted, otherwise it would be denied. The Court then, over the strenuous objections of petitioner's counsel, imposed an

arbitrary and unreasonable limitation of five days, completely disregarding said counsel, pointing out that he was engaged in trial, had a master's hearing and other emergency matters pending and would be unable to properly prepare amended complaint within such an unreasonable period of time (app. 67 and 76) notwithstanding the absolute right to amend, the Court entered an order denying leave to amend. Thus it is abundantly clear and self evident, from the cases, that the District Court is expressly excluded from any discretion whatsoever in the exercise of this absolute right, ergo, the arbitrary action by the Court that denied, modified, hindered and rendered conditional the petitioner's absolute right to amend, as a matter of course, under Rule 15, was reversible error *per se*. Further, for the Court to single out the petitioner for special discrimination, and exclusion from the absolute right conferred by said Rule 15 was in violation of the "Due Process Clause" of the 5th Amendment to the Constitution of the United States.

II.

The petitioner filed a motion to vacate the order denying leave to amend, with supporting brief citing said Rule 15 and numerous cases showing that the order was contrary to law and had been improperly entered. The only order asked or relief sought by this motion was to vacate the order denying leave to amend at the hearing on this motion, and before the Court had ruled on petitioner's motion, counsel for respondents, without notice, stipulation or consent of petitioner, took the petitioner by surprise by simultaneously making THREE SEPARATE ORAL MOTIONS, (1) To let respondents' brief and motion filed to original stand to proposed amended complaint (2) To strike proposed amended complaint (to which the Court

had already denied leave and had not yet vacated said order) (3) Dismiss the suit The Court automatically sustained ALL THREE SURPRISE ORAL MOTIONS, without any hearing whatsoever, stating "that will be the order" (App. 76) Counsel for petitioner tried to object but was interrupted by the Court. The recital of the Court of Appeals on page 4 of its opinion that there was no objection by petitioner is erroneous and CONTRADICTED by the transcript incorporated in the record on appeal, which shows that counsel for petitioner started to object but was interrupted by the Court with these statements, "If it will make you happy, I will grant your motion but I am going further, as I indicated, if you think I am wrong, there is a Court of Appeal." "THIS IS GOING TO BE THE ORDER MR. MINOR, leave will be given you to file the amended complaint, which we have in the file; the motion of the defendants to strike the original complaint will stand to the amended complaint, AND THAT MOTION WILL BE SUSTAINED" "THAT WILL BE THE ORDER" (App. 76 and 77) at the bottom of page 79 of the appendix the petitioner's counsel expressly and emphatically objected to entry of such orders, pointing out violation of rule 7, by surprise ORAL motions, that there had been no hearing on oral motions, no grounds stated for motions as required by rule 7, that petitioner had been denied opportunity to argue against oral motions, had been denied any opportunity to present authorities in support of the proposed amended complaint, (never filed by petitioner) the Court again interrupted and terminated objections with the arbitrary statement, "I will sign the Order."

The petitioner respectfully submits that this procedure cannot be justified on any ground whatsoever. Rule 7, of the Federal Rules of Civil Procedure provides, in ma-

terial part, that "all motions, unless made during a hearing on trial, shall be in writing, shall state with particularity the ground therefor, and shall set forth the relief or order sought". The same rule makes it mandatory that notice in writing be served upon the opposite party not later than 4:00 P.M. of the business day preceding the date the motion is to be presented, with proof thereof. The rules further provides that waiver of these requirements can be approved only and solely by stipulation or agreement of BOTH PARTIES (Emphasis supplied).

The said three surprise oral motions made by respondents clearly do not come within the meaning of a motion made duriung a hearing or trial: *Hamilton Knoulton* v. *Hartford, Conn.*, 26 F. Supp. 292 holds, "under this rule, motions made at a hearing are such as are incidental to the hearing itself, as motion to exclude evidence, or for mistrial, and on oral motion on a motion previously made, is not a hearing within this rule". *Orange Theater Corp.* v. *Rayherst Amusement Corp.*, 2 F.R.D. 278 holds, any other construction of this rule would lead to chaos in motion procedure: a party, for instance, might make a motion or serve notice for inspection of a document, and at a hearing therefor, and without any notice whatsoever, include a further motion to punish somebody for contempt."

In the instant case not only did the respondents violate the requirement for written notice and ground therefor, but even in the surprise oral motions, gave no reason or ground, but just orally announced to the Court that they were making said three motions, and the Court automatically sustained all three (App. 76 and 77). *Rosenberg* v. *Baum*, 153 F. 2d 10 holds, "a judgment, decision or de-

termination by a judge or chancellor, prior to a hearing of all the evidence, amounts to a deprivation of property without due process of law." *L. B. Wilson Inc.* v. *Federal Communications Comm.*, 170 F 2d 793 holds, "The due process of Law guaranty of hearing draws no distinction between questions of law and questions of facts."

III.

The complaint and proposed amended complaint are based on abuse and misuse of official positions by respondents, who fraudulently and knowingly procured a void Court order NOT ONLY WITHOUT A REGULAR AND AUTHORIZED COURT PROCEDURE, but where such Court procedure to procure said void order was specifically prohibited by law. The petitioner's deceased husband had already perfected his appeal to the Illinois Appellate Court. At the time the appeal was perfected, the only judgment of the Trial Court was imposition of a $11,000.00 fine there was no judgment or order for body execution or imprisonment until fine was paid. Chapter 110 Illinois Revised Statutes, 1961 Section 76 (2) specifically provides that, "an appeal is perfected when the notice of appeal is filed in the lower Court. After being perfected no appeal shall be dismissed without notice, and NO STEP other than that by which the appeal is perfected is jurisdictional". Further Chapter 110, Illinois Revised Statutes, Section 68.1 and 2 limits the jurisdiction of Trial Courts to 30 days after entry of the final order. It will be recalled that the void order was secretly procured from trial judge more than 60 days after entry of final order and after an appeal had been perfected when the Court was expressly excluded from jurisdiction. The United States Circuit Court of Appeals for the 7th Circuit, on Page 2 of its opinion erroneously recited that "counsel for petitioner in oral

argument contended that failure to apply for a supersedeas bond permitted execution of unpaid judgment only." The correct facts are that AN APPLICATION FOR SUPERSEDEAS BOND WAS IN FACT MADE to the Illinois Appellate Court. In fact, one of the allegations of the complaint is that the respondent, JOHN MELANIPHY, with full knowledge of GLICK'S corrupt act, and the desperate physical condition of ARTHUR WISE, ratified GLICK'S act and threw the full weight, prestige and power of his office and the City of Chicago TO OPPOSE AND PREVENT APPROVAL OF A SUPERSEDEAS. By a coincidence, Justice Roger Kiley one of the panel of judges that heard the appeal in the Circuit Court of Appeals below, was also on the panel of three judges in the Illinois Appellate Court where the the decedent's appeal was pending when the application for a supersedeas bond was made. The said Court of Appeals misapprehends that counsel, in answer to a question, stated that an application for supersedeas was positively made, but that he believed it to be a moot question, because even if the application had not been made (which it was) it would have permitted execution of judgment ALREADY ENTERED, ONLY, but by no theory of law, would have authorized entry by trial Court of new or additional judgment or orders, which in fact was prohibited by statute (Ch. 110 Ill. Revised Statutes Par. 76 (2)). The Court of Appeals on page 2 of its opinion, states, "However, the Corporation Counsel's office, elected instead to proceed under Illinois Municipal Code (Ill. Rev. Stat. 1961 Ch. 24) which provides that: The person upon whom any fine or penalty is imposed, upon the order of the Court, before whom the conviction is had MAY BE committed to any place provided by ordinance for the incarceration of offenders until the fine or penalty and costs are fully paid." (emphasis sup-

plied) The Court of Appeals continues, "Thus the respondent, SOL M. GLICK, Assistant Corporation Counsel secured an order for the commitment of MR. WISE." The Court of Appeals does not state on what theory of law, or cite one single precedent to explain how there could be any ELECTION to proceed in the Trial Court and get an order after the case had been appealed, and any procedure by Trial Court is expressly prohibited. Further the statute cited does not require imprisonment until fine is paid but states "MAY BE IMPRISONED." Further, every Illinois case on the subject points out, that if a Court invokes this statute it must be done AT THE TIME THE JUDGMENT IS ENTERED. So if the Trial Court did not exercise its discretion to imprison decedent when it had jurisdiction, by what legal theory can it proceed, in private with respondent, when it is prohibited by statute from entered any kind of order and after it would have lost jurisdiction, by lapse of time even if there had been no appeal. There is not one precedent to support this procedure, and the complaint sets out that the trial judge himself CONCEDED lack of jurisdiction, in open Court, to enter said order; so how could he properly later enter it in response to private request by MR. GLICK, Assistant Corporation Counsel?

Title 42 U.S.C.A. 1983 Provides, towit: "Every Person who, under the color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof, to the rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress." The Court will please take judicial notice that

the material part of this section (1983) states that the wrong doer shall be liable to the PARTY INJURED, which *Barnes Coal Corporation* v. *Retail Coal Merchants Assn.*, 128 F. 2d 645. *Davis* v. *Johnson*, 138 F. Supp. 572, *Bowles* v. *Farmers National Bank*, 147 F. 2d 425 and other decisions hold includes administratrixs of the one of the estates of deceased persons entitled to bring the action. In *Monroe* v. *Pope*, 365 U.S. 167 at page 181; *Williams* v. *United States*, 341 U.S. 97; *Screws* v. *United States*, 325 U.S. 91; *United States* v. *Classic*, 313 U.S. 299, this Court held, "Congress in enacting R. S. 1979 (42 U.S.C.A. 1983) meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." In *Monroe* v. *Pope* this Court further said that the decision "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *United States* v. *Classic*, 313 U.S. 299 at page 326 defined color of law as "misuse of power possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authorities of State Law. *Monroe* v. *Pope*, above cited, further holds, "the statutory words, under color of any statute, ordinance, regulation, custom or usage of any state or territory DO NOT EXCLUDE acts of an OFFICIAL or policeman who can show no authority, under State law, custom or usage TO DO WHAT HE DID, or even WHO VIOLATED STATE CONSTITUTION AND LAWS" (Emphasis supplied). Thus it is self evident and abundantly clear that allegations of facts in the complaint and amended complaint in the case as bar constituted both a deprivation, under color of State authority, of the guarantee against unreasonable searches and seizures contained in the 4th Amendment, and the guarantee against deprivation of life, liberty and prop-

erty, contained in the 5th Amendment to the Constitution of the United States, and made applicable to the States by the due process clause of the 14th Amendment (*Monroe* v. *Pope*) and satisfies to that extent the requirement of R.S. 1979 (42 U.S.C.A. 1983) Therefore it was reversible error to strike complaints and dismiss suit.

IV.

On Page 5, of its opinion, the Court of Appeals below, based its decision affirming the judgment of the District Court below, on its observations, towit: "The defendants here are a Municipal Corporation and two prosecuting officials of that Municipality. Because of the basis on which this appeal has been decided, we do not reach all of the other issues presented by plaintiff." This Honorable Supreme Court will please note that the Court of Appeals below in its ruling does not hold, that the acts of the two prosecutors was in connection with official prosecutions, but only that they are TWO PROSECUTING OFFICIALS of that Municipality. This ruling is contrary even to the case relied on and cited on Pages 4 and 5 of its opinion as authority for its decision towit, "In *Swift* v. *Lynch, supra* (page 239) Chief Judge Duffy speaking for this Court said: In *Easton* v. *Bibb,* 7 ar. 217 F. 2d 446.449 we cited with approval *Laughlin* v. *Rosenman,* 82 U.S. App. D. C. 164, 163 F. 2d 838 as authority for the proposition that prosecuting officials are not to be amerced by actions in prosecuting officials are not to be amerced by actions in connection WITH OFFICIAL PROSECUTIONS even though it is alleged that such acts were done maliciously." (Emphasis supplied) Then the Court concluded that since respondents were TWO PROSECUTORS they were immune to Civil suit.

The only immunity from suits known to the common law, (and not changed by statute in Illinois) is judicial immunity limited to judges for acts done by them in connection with their JUDICIAL FUNCTION, if they had jurisdiction over the parties or subject matter. But by the weight of authorities, not even JUDGES are protected by the cloak of immunity OUTSIDE the scope of jurisdiction and authority, 100 U.S. 339 25 L. ed. 676. In *Stift* v. *Lynch*, 267 F. 2d 237, 239 relied on by the Court of Appeals below, the common law immunity was extended to State's Attorneys and assistant state's attorneys for their action in connection with OFFICIAL PROSECUTIONS, on the theory that they are JUDICIAL OFFICERS. *Lewis* v. *Brautigan*, 5 Cir. 227 F. 124 Pages 128.129 55 A.L.R. 2d 505, holds, "Immunity is based upon whether the acts were performed WITHIN THE SCOPE OF JURISDICTION AND AUTHORITY." (Emphasis supplied)

The foregoing in reality is a MOOT QUESTION notwithstanding that the Court of Appeals based its decision SOLELY by purportedly sustaining "a plea in bar" NO SUCH plea had been filed by respondents in the District Court, no issue had been formed by such Plea, no hearing or decision by said District Court and no appeal of issue or appeal before Court of appeals below. It is too well settled to admit of argument that there can be no "plea in bar" issue formed or decided unless SPECIFICALLY PLEADED, OR SET OUT BY FACTS ON THE FACE OF THE COMPLAINT ITSELF. In the case at bar, the respondents relied EXCLUSIVELY on a motion to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted, and that, not a non existent plea in bar, was one of the issues properly before the Court of Appeals below, for its determination.

V.

As previously pointed out the Court of Appeals, below, based its decision on erroneously sustaining a non existent "plea in bar" that had never been raised or pleaded by respondent in District Court and which was contradictory to facts set out and alleged by complaints. The Court further concluded, on page 5 of its decision, because of the basis on which this appeal has been decided, we do not reach all of the other issues presented by plaintiff."

The petitioner respectfully submits that the Court of Appeals, below, DID NOT REACH OR DECIDE ONE SINGLE ISSUE PRESENTED by petitioner, in her notice of appeal, and specifically set out in the STATEMENT OF ISSUES, in her brief, are (1) "Did not the District Court err in hindering, limiting and attaching conditions to petitioner's ABSOLUTE right to amend under Rule 15, and then preventing any amended complaint from being filed?" (2) "Did not the District Court err in allowing and automatically sustaining defendants' three surprise oral motions without any hearing whatsoever"? (3) "Did not the District Court err in entering order striking a proposed amended complaint, never filed, and dismissing suit pursuant to said defendants three surprise oral motions?" (4) "Did not the District Court err in ruling that neither the complaint nor proposed amended complaint stated a claim upon which relief could be granted?" *Long* v. *Union Pacific Railroad Company*, 206 F. 2d 829 holds, "This rule providing that notice of appeal shall designate judgment or part thereof appealed is a mandatory requirement, and jurisdiction of Court of Appeals IS LIMITED TO JUDGMENT OR PORTION THEREOF SO DESIGNATED" (Emphasis supplied) *Ropey* v. *Day and Zimmerman*, 67 S. Ct. 1082, this Court held, "questions WHICH WERE NOT PRESENTED IN

POINTS TO BE ARGUED, COULD NOT BE CONSIDERED" (Emphasis supplied).

The petitioner respectfully submits that the Court of appeals, below, in its opinion, departed entirely from the issues on appeal, and considered, evaluated and decided the merits of the case which were not in issue, that there had been no hearing or decision on said merits in the District Court, or presented as issue or appeal. That on pages 4 and 5 of its opinion, the Court of Appeals below addressed itself to construction of a statute from the Municipal Code of Chicago and consideration of a plea in bar as justification or defenses to the conduct of respondents notwithstanding that said respondents have not pleaded any defenses or justification whatsoever; that there were no issues formed, hearing or decision on same in District Court below, or appeal from same. Therefore, the petitioner respectfully submits this this is not only inconsistent with the limitations on the jurisdiction of the Court of Appeals below, as a Court of review, but contrary to the Due Process Clause of the Constitution of the United States.

CONCLUSION.

We respectfully submit that the procedure in United States District Court, for the Northern District of Illinois, Eastern Division, was in complete derogation of the petitioner's rights under the United States Constitution, that in the interest of substantial justice, to prevent possible widespread abuses, and in the interest of the protection of the substantial rights of all the people of the United States, this case requires that this Court grant its writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, and that upon a hearing of the issues makes its decision known.

Respectfully submitted,

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APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 13659 September Term, 1962 September Session, 1962

BERNICE WISE, Administratrix of the estate of ARTHUR WISE, Deceased,
Plaintiff-Appellant,
vs.
CITY OF CHICAGO, JOHN MELANIPHY, Corporation Counsel of the City of Chicago, SOL M. GLICK, Asst. Corporation Counsel,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

September 27, 1962.

Before KNOCH, CASTLE and KILEY, *Circuit Judges.*

KNOCH, *Circuit Judge*, Bernice Wise, Administratrix of the estate of Arthur Wise, deceased, plaintiff-appellant, filed her Complaint at Law in the United States District Court to recover $1 million from defendants-appellees, City of Chicago, John Melaniphy, Corporation Counsel of the City of Chicago, and Sol M. Glick, Assistant Corporation Counsel, on the ground that Arthur Wise, deceased, had suffered deprivation of his civil rights and had been injured in his rights under the United States Constitution at their hands.

From the Complaint it appears that Arthur Wise was tried in the Municipal Court of Chicago on charges of building code violation, found guilty and fined $1,000. Mr. Wise took his appeal to the Illinois Appellate Court, asserting that the Municipal Court Judge had forced him to trial without advice of counsel, and had arbitrarily denied him even a few hours' continuance to secure witnesses who could prove that the alleged violation of the Municipal building code had been corrected before the action against Mr. Wise in the Municipal Court had been filed. It is nowhere alleged that the fine was paid, or that notice of appeal was supported by a bond to secure the adverse party, so that the notice of appeal might operate as a supersedeas pursuant to Illinois Revised Statutes (1961 Ch. 110, Par. 82(1). In oral argument before this Court, counsel for Mrs. Wise contended that failure to apply for a supersedeas bond permitted execution of the unpaid judgment for the fine against property of the decedent only. However, the Corporation Counsel's office elected instead to proceed under Illinois Municipal Code [Ill. Rev. Stat. (1961) Ch. 24, Par. 1-2-9] which provides that:

> The person upon whom any fine or penalty is imposed, upon the order of the court * * * before whom the conviction is had, may be committed * * * to any place provided by ordinance for the incarceration of offenders until the fine, penalty, and costs are fully paid.

and under the Municipal Code of Chicago, Ch. 24, Sec. 24-5, which provides for receiving ordinance violators at the House of Correction. Thus, defendant Sol M. Glick, Assistant Corporation Counsel, secured an order for the commitment of Mr. Wise. It is plaintiff's position that the Municipal Court lost jurisdiction of the cause and was powerless to enter an order for the commitment because 60 days had elapsed since the imposition of the fine and because the Illinois Revised Statutes (1961) Ch. 110, Par. 76(2), provides that an appeal is perfected when notice of appeal is filed in the lower court.

In describing the issuance of the order for commitment in her Amended Complaint, plaintiff states that the Corporation Counsel's office served notice of motion for entry of an order for warrant, arrest and commitment of Arthur Wise; that plaintiff's counsel appeared in the Municipal Court and argued that the Municipal Court had lost jurisdiction to enter such an order by virtue of the time lapse and notice of appeal; that the files were not then in Court, because they were in process of compilation for the Appellate Court; that the Municipal Court Judge stated that the motion could not be heard without the file; that plaintiff's counsel then left the courtroom; that the Assistant Corporation Counsel then secured the file, brought it into Court, and in the absence of plaintiff's counsel, procured the entry of the order for warrant, arrest and commitment.

Both the original and the Amended Complaint aver that prior to the issuance of the warrant, Mr. Wise was the vistim of a near-fatal "hit and run" accident, that despite his invalid condition, he was forcibly taken from his home by bailiffs of the Municipal Court and removed to the House of Correction Hospital, where he died three months later.

The defendants moved to dismiss plaintiff's original Complaint in the District Court on the ground that it failed to state a claim on which relief could be granted. Brief in support of that motion was filed, to which plaintiff filed her brief in opposition, and defendants filed their brief in reply. Shortly after filing her brief in opposition to the motion to dismiss, plaintiff filed a motion to amend the Complaint. Plaintiff argues that no responsive pleading having been filed, plaintiff was at liberty to amend her Complainf as a matter of right, but that it would be reversible error to deny leave to amend when plaintiff had sought it. Counsel for plaintiff states in his affidavit (Plaintiff's Appendix, page 50) that the District Judge recommended withdrawal of the motion for leave to amend pleading decision on the pending motion to dismiss on which the court already had extensive briefs, and that, pursuant

to this recommendation of Court, counsel withdrew his motion for leave to amend on October 16, 1961.

On November 22, 1961, the District Judge allowed the motion to dismiss. On December 4, 1961, plaintiff renewed her motion to amend and moved to vacate the dismissal. In the affidavit filed in support of this motion, counsel for plaintiff alleged that additional and material facts and wrongful acts of defendants could be set out; that matters recited in the Complaint could be set out more fully and with greater specification; that there had been continuing damage, including a foreclosure suit, loss of rents and profits, losses consequent on inability to pay Mr. Wise's debts during his incarceration, all of which counsel wished to incorporate in an amended complaint.

Plaintiff asserts that the District Judge directed submission of the proposed Amended Complaint for examination by the Court within five days, which plaintiff describes as inadequate for preparation of such Amended Complaint.

On December 13, 1961, the District Judge denied leave to amend because he found that the proposed Amended Complaint, as submitted, did not cure the defects of the original Complaint. Plaintiff moved to set aside this order.

On December 26, 1961, having heard argument of counsel, the District Court vacated the order of December 13, 1961; granted leave to file the Amended Complaint; allowed defendants' motion to strike the original Complaint to stand as to the Amended Complaint; and allowed that motion because of plaintiff's failure to state a claim on which relief could be granted.

Plaintiff contends that the motion of defendants to strike the Amended Complaint ought to have been made in writing after service of notice. The record, however, shows that this motion was made in open court in the course of the hearing on December 22, 1961, on plaintiff's motion to vacate the order of December 13, 1961, and without objection at that time from plaintiff.

On January 4, 1962, the District Court denied a motion to vacate the orders of December 26, 1961, and this appeal followed.

In our opinion, *Monroe* v. *Pape*, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) and *Stift* v. *Lynch*, 7 Cir., 1959, 267 F. 2d 237, are dispositive of this appeal. Plaintiff attempts to distinguish these cases from the matter before us. Those elements in the Complaint and Amended Complaint on which plaintiff relies as distinguishing factors constitute argumentative and conclusory averments rather than factual allegations, and, as such, contrary to plaintiff's assertion, are not admitted by the motion to dismiss.

Plaintiff invoked the jurisdiction of the District Court under Title 42, U. S. C. A. § 1983. In *Monroe* v. *Pape*, *supra* [365 U. S. 187, 5 L. Ed. 2d 505] the United States Supreme Court held that Congress did not undertake to bring municipal corporations within the ambit of that statute. In *Stift* v. *Lynch*, *supra*, [page 239] Chief Judge Duffy, speaking for this Court, said:

> In *Easton* v. *Bibb*, 7 Cir., 217 F. 2d 446, 449, we cited with approval *Laughlin* v. *Rosenman*, 82 U. S. App. D. C. 164, 163 F. 2d 838, as authority for the proposition that prosecuting officials are not to be amerced by actions in connection with official prosecutions even though it is alleged that such acts were done maliciously.

The defendants here are a municipal corporation and two prosecuting officials of that municipality. Because of the basis on which this appeal has been decided, we do not reach all of the other issues presented by plaintiff. We have carefully considered all arguments advanced on her behalf. None of them alters our conclusion that the ruling of the District Court must be affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, September 27, 1962

Before
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

BERNICE WISE, Administratrix of the estate of Arthur Wise, Deceased,
Plaintiff-Appellant,
vs.
CITY OF CHICAGO, JOHN MELANIPHY, Corporation Counsel of the City of Chicago, SOL M. GLICK, Asst. Corporation Counsel,
Defendants-Appellees.

No. 13659

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

Mandate Issued: Oct. 30 1962

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, October 25, 1962

Before
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

BERNICE WISE, Administratrix, etc.,
Plaintiff-Appellant,
vs.
CITY OF CHICAGO, et al.,
Defendants-Appellees.

No. 13659

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petiion for a rehearing of this cause be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, October 25, 1962

Before
Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

BERNICE WISE, Administratrix, etc.,
Plaintiff-Appellant,
vs.
CITY OF CHICAGO, et al.,
Defendants-Appellees.

No. 13659

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

It Is Ordered by the Court that plaintiff-appellant's petition for a rehearing of this cause *en banc* be, and the same is hereby, DENIED.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 770

BERNICE WISE,

Petitioner,

vs.

CITY OF CHICAGO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION

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INDEX

	Page
Opinion of the Court of Appeals	1
Statutes, Rules, and Ordinances Involved	1
Question Presented	2
Statement of the Case	2
Reasons For Denying The Writ	4
A. A Municipal Corporation Is Not A Person Within The Meaning Of The Civil Rights Act	4
B. Corporation Counsels When Acting In Their Official Capacity As Prosecutors Of Law Violators Are Immune From Civil Suits Based On Such Prosecutions	5
C. The Complaint As Amended Was Properly Dismissed	11
Conclusion	14
Appendix X	15

Authorities

Alzua v. *Johnson*, 231 U.S. 105	6, 8
Anderson v. *Rohrer*, 3 F. Supp. 367 (D., Fla. 1933)	8
Arnold v. *Hubble*, 18 Ky. L. Rep. 947, 38 S.W. 1041 (1897)	8
Barr v. *Matteo*, 360 U.S. 564	8
Bottone v. *Lindsley*, 170 F. 2d 705 (10th Cir. 1957), cert. den. 356 U.S. 950	10
Bradley v. *Fisher*, 13 Wall. 335	6, 7, 8
Casey v. *McGuire*, 321 Ill. App. 308, 52 N.E. 2d 822 (1944)	11
Conley v. *Gibson*, 355 U.S. 41	13
Cook v. *United States*, 288 U.S. 102	6
Cooper v. *O'Connor*, 99 F. 2d 135 (D.C. Cir. 1938), cert. den. 304 U.S. 643, rehearings den. 305 U.S. 673, 307 U.S. 651	8
Egan v. *City of Aurora*, 365 U.S. 514	5
Exploration Co. v. *United States*, 247 U.S. 435	6
First National Bank v. *Road Dist. No. 8*, 389 Ill. 156, 58 N.E. 2d 884 (1945)	11

	Page
Francis v. *Grafts*, 203 F. 2d 809 (1st Cir. 1953)	8
Holy Trinity Church v. *United States*, 143 U.S. 457	6
Johnson v. *Stone*, 268 F. 2d 803, (7th Cir. 1955)	10
Kittler v. *Kelsch*, 56 N.D. 227, 216 N.W. 898 (1927)	8
Kostal v. *Stoner*, 292 F. 2d 492 (10th Cir. 1961)	8
Laughlin v. *Garnett*, 138 F. 2d 931 (D.C. Cir. 1943) cert. den. 322 U.S. 738	8
Laughlin v. *Rosenman*, 163 F. 2d 838 (D.C. Cir. 1947)	8, 9
Lyons v. *Baker*, 180 F. 2d 893 (5th Cir. 1950)	8
Monroe v. *Pape*, 365 U.S. 167	4, 5
Pearson v. *Reed*, 6 Cal. App. 2d 277, 44 P. 2d 592 (1935)	8, 9
Peckham v. *Scanlon*, 244 F. 2d 761 (7th Cir. 1957)	8
People ex rel Dilks v. *Board of Education*, 283 Ill. App. 378 (1936)	11
Randall v. *Brigham*, 7 Wall. 523, 19 L.ed. 285	6
Rhodes v. *Houston*, 202 F. Supp. 624 (D. Nebr. 1962)	8
Screws v. *United States*, 325 U.S. 91	10
Smith v. *Parman*, 101 Kan. 115, 165 Pac. 663 (1917)	8
Spalding v. *Vilas*, 161 U.S. 483	7, 8
Spriggs v. *Pioneer Carissa Mines, Inc.*, 251 F. 2d 61, (10th Cir. 1957), cert. den. 356 U.S. 950	10
Stift v. *Lynch*, 267 F. 2d 237 (7th Cir. 1959)	4, 8, 9
Tenny v. *Brandhove*, 341 U.S. 367	6, 8, 9
United States v. *American Trucking*, 310 U.S. 534	6
United States v. *Kirby*, 7 Wall. 482	6
Wise v. *City of Chicago*, 36 Ill. App. 2d 196, 183 N.E. 2d 538 (1962)	3, 11, 13
Yaselli v. *Goff*, 12 F. 2d 396 (D.C. Cir. 1926) affd. 275 U.S. 502	8

Statutes:

42 U.S. C. § 1983	2, 5, 6, 10, 16
Illinois Revised Statutes, 1961	
Ch. 24, par. 1-2-9	2, 17
Ch. 110 par. 68.1 (3)	12, 17
par. 76 (2)	11, 18
par. 82 (1)	3, 12, 18

Ordinances: Page

Municipal Code of Chicago, 1939, as amended to January 1, 1962

Ch. 24, sec. 24-5 ..... 2, 18

Other:

50 American Jurisprudence, Statutes § 339 6
3 Blackstone's Commentaries 126 5
27 Corpus Juris Secundum § 3064 8
Prosser On Torts (2d ed. 1955) § 109 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 770

BERNICE WISE,

Petitioner,

vs.

CITY OF CHICAGO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION

Opinion of the Court of Appeals

The opinion of the United States Court of Appeals for the Seventh Circuit has been reported in 308 F. 2d 364.

Statutes, Rules, and Ordinances Involved

The statutes, rules, and ordinance provisions involved have been set forth as Appendix X to this brief, and are as follows:

42 U.S.C.A. § 1983.

Rules 5(e), 7(b)(1), 15, and 75(g) of the Federal Rules of Civil Procedure.

Illinois Revised Statutes, 1961, ch. 24, par. 1-2-9; ch. 110, pars. 68.1(3), 76(2), 82(1).

Municipal Code of Chicago, 1939, as amended to January 1, 1962, ch. 24, sec. 24-5.

Question Presented

Does the Federal Civil Rights Act confer a right of action against a City, its Corporation Counsel and an Assistant Corporation Counsel for the performance of their official duties in prosecuting a landlord who is convicted of violating the City's Building Code?

Statement of the Case *

Arthur Wise, the owner of apartment house property was tried, found guilty and fined $1,000.00 in the Municipal Court of Chicago for violating the Chicago Building Code. Three months after being committed pursuant to court order to work out his fine, he died in the House of Correction.

His Administratrix has brought this action under the Federal Civil Rights Act seeking damages against the City of Chicago, and its Corporation Counsel and one of his assistants. The allegations of the Amended Complaint are that defendants brought the deceased before a Court on charges of violating the City Building Code and that the Court convicted deceased and issued the order of commitment referred to above.

While a notice of appeal from the conviction was filed,

* The facts herein are summarized from the Complaint contained in the Appendix (hereinafter cited as App.) filed in the United States Circuit Court of Appeals in this case, and from the Additional Appendix (hereinafter cited as Add. Appx.) filed as a supplement to Appellees' brief in this case in the Circuit Court of Appeals. These appendices have been filed as the Record in this Court. The Appendix to this Brief is cited as Appendix X.

as is stated in the opinion of the United States Circuit Court of Appeals:

> "It is nowhere alleged that the fine was paid, or that notice of appeal was supported by a bond to secure the adverse party, so that the notice of the appeal might operate as a supersedeas pursuant to Illinois Revised Statutes (1961), Ch. 110, par. 82(1)."

The Amended Complaint alleges that the Corporation Counsel's office served notice upon Arthur Wise of a motion for entry of an order for warrant, arrest and commitment due to his failure to pay the fine, that Defendant's counsel appeared in Municipal Court and opposed the motion on the grounds that the Court had lost jurisdiction by virtue of time lapse and the filing of the notice of appeal. It is also alleged in the Amended Complaint that the files were not then in Court, because they were in process of compilation for the Appellate Court; that the Municipal Court Judge stated that the motion could not be heard without the file; that Plaintiff's counsel then left the courtroom; that the Assistant Corporation Counsel then secured the file, brought it into Court, and in the absence of Plaintiff's counsel, procured the entry of the order for warrant, arrest and commitment. This commitment did not prevent Arthur Wise from proceeding with his appeal or from obtaining a supersedeas bond and order from the Illinois Appellate Court. The appeal was voluntarily abandoned and dismissed on January 24, 1961. See *Wise* v. *City of Chicago*, 36 Ill. App. 2d 196, 198, 183 N. E. 2d 538 (1962).

The Petition on pages 6, 7 and 16 states the individual defendants acted "outside the discharge of their official duties." But the Complaint and the Amended Complaint state the opposite, making the allegations that the individual defendants acted "in the due course of" their

"employment" and "acting directly for the City of Chicago."[1] Many other statements and misstatements of fact are made in the Petition which are not alleged in the Complaint, or otherwise set forth in the record, but, the Amended Complaint and record are controlling and defendants will not detail these inaccuracies because they are so numerous and irrelevant to the issue herein.

Contrary to the statement on page 4 of the Petition the District Court *did* allow Plaintiff to file an Amended Complaint (App. 62, 76-77). The order of dismissal applied to the Complaint as Amended (App. 62, 76, 77). The record of the District Court's extensive consideration of this matter over a period of five months is set forth in the Appendix filed in the Circuit Court of Appeals (see especially App. 88-89).

The Circuit Court of Appeals affirmed the dismissal of the Amended Complaint on the grounds that under *Monroe* v. *Pape*, 365 U.S. 167, the City is not within the ambit of the Civil Rights Act and the individual defendants were acting as prosecuting attorneys and as held in *Stift* v. *Lynch*, 267 F. 2d 237, 239 (7th Cir. 1959), "Prosecuting officials are not to be amerced in connection with official prosecutions even though it is alleged that such acts were done maliciously."

II

Reasons For Denying The Writ

A. *A Municipal Corporation Is Not A Person Within The Meaning Of The Civil Rights Act*

This Court in the case of *Monroe* v. *Pape*, 365 U.S. 167, 191, held that a motion to dismiss a complaint brought

[1] Complaint par. 3, (App. 5) par. 4(b) (App. 6), Amended Complaint par. 4, 5(a), 5(b), 6. 6(b), 6(c), 6(d) and 8 (Add. Appx. vii).

under the Civil Rights Act [2] against a municipal corporation was properly granted saying:

> "The response of the Congress to the proposal to make municipalities liable for certain actions brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." [3]

This action therefore cannot be maintained against the City of Chicago.

B. *Corporation Counsels When Acting In Their Official Capacity As Prosecutors Of Law Violators Are Immune From Civil Suits Based On Such Prosecutions.*

It is a fundamental principle of the common law antedating the founding of our Country that officials acting as prosecutors of law violators are immune from civil suits arising out of such prosecutions.[4] This principle is based on the necessity that the office of public prosecutor must be administered with courage and independence, without fear of personal consequences. If public prosecutors are to be subjected to personal damage suits for acts undertaken in the performance of their official functions, the proper and effective administration of the duties of their

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[2] 42 U.S.C. § 1983, Appendix X at p. 16.

[3] Footnote 50 at 365 U.S. 191 states that since a municipal corporation is held not a "person" within the meaning of 42 U.S.C. § 1983 any inference to the contrary can no longer be drawn from prior cases. In accord, *Egan v. City of Aurora*, 365 U.S. 514.

[4] 3 BLACKSTONE'S COMMENTARIES 126, ". . . It would be a very great discouragement to the public justice of the kingdom, if prosecutors, who have a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried."

offices would be seriously crippled and curtailed. This fundamental principle was the foundation of the Circuit Court of Appeals decision herein. That decision was in turn based upon a long line of decisions of this Court.

This principle of immunity from civil suit for actions based upon public duties has been applied by this Court to judges and other public officials such as legislators as well as prosecuting attorneys. And though this immunity principle is not expressly stated in the Civil Rights Act, this Court has applied it to actions under the Act as a vital part of the congressional intent. *Tenny* v. *Brandhove*, 341 U.S. 367, 376-379. This rule requiring the reading of commonly understood and applied exemptions into broad statutory language has been stated by this Court in many fields of the law. *Holy Trinity Church* v. *United States*, 143 U.S. 457; *United States* v. *Kirby*, 7 Wall. 482, 486; *United States* v. *American Trucking*, 310 U.S. 534, 542; *Cook* v. *United States*, 288 U.S. 102, 121; *Exploration Co.* v. *United States*, 247 U.S. 435, 449; 50 *Am. Jur. Statutes* § 339, pp. 331-332.

Illustrative decisions by this Court applying the fundamental principle of immunity from civil liability to actions against judges are many and unanimous. In *Alzua* v. *Johnson*, 231 U.S. 105, involving an action against a Philippine Justice, this Court said:

> "• • • we regard it as fundamental that the immunity of the defendant from this suit is the same as that of judges in the United States, which is established beyond dispute. *Bradley* v. *Fisher*, 13 Wall. 335, 20 L.Ed. 646; *Randall* v. *Brigham*, 7 Wall. 523, 19 L.Ed. 285."

The reason for this rule of immunity is set forth in *Bradley* v. *Fisher*, 13 Wall. 335:

> "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. • • • Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in that way be the subject of judicial inquiry. • • • If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

In the case of *Spalding* v. *Vilas*, 161 U.S. 483, this Court held that a public officer is not liable for instituting a prosecution even though he acted with malice and without probable cause provided the matters acted upon were among those generally committed by law to the control and supervision of his office. This common law rule has been affirmed repeatedly by both federal and state courts. *Cooper* v.

O'Connor, 99 F. 2d 135 (D.C. Cir. 1938), cert. den. 304 U.S. 643, rehearings den. 305 U.S. 673, 307 U.S. 651 (United States District Attorney and Assistant District Attorney); *Yaselli* v. *Goff*, 12 F.2d 396 (D.C. Cir. 1926), aff'd. 275 U.S. 502 (Special Assistant to the United States Attorney General); *Arnold* v. *Hubble*, 18 Ky. L. Rep. 947, 38 S.W. 1047 (1897) (City Attorney); *Smith* v. *Parman*, 101 Kan. 115, 165 P. 663 (1917) (City Attorney); *Laughlin* v. *Rosenman*, 163 F.2d 838 (D.C. Cir. 1947) (United States Attorney General and Special Assistant to Attorney General); *Stift* v. *Lynch*, 267 F.2d 237 (7th Cir. 1959) (State's Attorney and Assistant States's Attorney); *Pearson* v. *Reed*, 6 Cal. App. 2d 277, 44 P.2d 592 (1935) (City Prosecutor); *Anderson* v. *Rohrer*, 3 F. Supp. 367 (D. D.C. 1933) (District Attorney); *Laughlin* v. *Garnett*, 138 F.2d 931, cert. den. 322 U.S. 738 (United States Attorney); *Kostal* v. *Stoner*, 292 F.2d 492 (10th Cir. 1961) (State Prosecuting Attorney); *Peckham* v. *Scanlon*, 241 F.2d 761 (7th Cir. 1957) (Assistant States's Attorney); *Rhodes* v. *Houston*, 202 F. Supp. 624 (D. Nebr. 1962) (County Attorney and Attorney General); *Kittler* v. *Kelsch*, 56 N.D. 227, 216 N.W. 898 (1927) (States Attorney); Prosser on Torts, § 109 at 781 (2d Ed. 1955); 27 C.J.S., § 3064 at 732.

In addition to the immunity granted to public prosecutors, like immunity has been afforded to executive, legislative and judicial officers when engaged in carrying out the duties required of their offices. The following cases are merely illustrative of instances of the application of this principle: *Barr* v. *Matteo*, 360 U.S. 564 (Acting Director of the Office of Rent Stabilization); *Spalding* v. *Vilas*, *supra* (Postmaster General); *Tenny* v. *Brandhove*, *supra* (State Legislators); *Bradley* v. *Fisher*, *supra* (Judges); *Alzua* v. *Johnson*, *supra* (Judges); *Lyons* v. *Baker*, 180 F.2d 893 (5th Cir. 1950) (Grand Jury); and *Francis* v. *Grafts*, 203 F.2d 809 (1st Cir. 1953) (Judges).

Of the above cases the following were brought under the Civil Rights Act: *Laughlin* v. *Rosenman; Stift* v. *Lynch* and *Tenny* v. *Brandhove*, and the universal rule was applied.

The California Court of Appeals in *Pearson* v. *Reed*, 6 Cal. App. 2d 277, 44 P. 2d 592 (1935), stated this rule as to public prosecutors in concise language:

> "The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be, if the prosecutor is made subject to suit by those whom he accuses and failed to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. Not only would the prosecutor himself be subjected to groundless suits, but his deputies likewise would be accused. The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office."

The charges in the Petition that the individual Defendants in prosecuting Plaintiff's husband acted outside the scope of their duties is not in accordance with the Complaint. See *supra*, page 3. The facts clearly refute any possible interpretation supporting such a claim as the public prosecutors here have acted—and can only act—under the applicable statutes and ordinance in Court and pursuant to Court orders. On the facts alleged in all versions of the Complaint this is irrefutable. So the attempt to insert a new charge in the Petition which is not contained in the

Complaint that the public prosecutors did not act within the scope of their official duties is unsupportable factually or legally. This obvious attempt to get around the Circuit Court of Appeals decision herein is without merit.

Finally, it should be pointed out that the Civil Rights Acts were enacted to protect the civil rights of individuals and were not intended to discipline or harass law enforcement officers in the enforcement of the law. *Screws* v. *United States*, 325 U.S. 91. The circumstances of which petitioner complains demonstrate that the acts were performed in the prosecution and decision of matters in a court of competent jurisdiction, where the court had jurisdiction of the subject matter and of the parties and was authorized and empowered to decide the issue presented. The complaint, original or as amended, therefore states no claim upon which relief can be granted under the Civil Rights Act. *Spriggs* v. *Pioneer Carissa Gold Mines, Inc.*, 251 F. 2d 61, 62 (10th Cir. 1957), *cert. denied*, 356 U.S. 950. In *Johnson* v. *Stone*, 268 F. 2d 803 (7th Cir. 1955) the court quoted with approval language from the opinion in *Bottone* v. *Lindsley*, 170 F. 2d 705, 707 (10th Cir. 1948), *cert. denied*, 336 U.S. 944, which is particularly applicable to the circumstances present in the case at bar, as follows (268 F. 2d at 804-05):

> ". . . [T]o make out a cause of action under the civil rights statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law. To hold otherwise would open the door wide to every aggrieved litigant in a state court proceeding, and set the Federal Courts up as an arbiter of the correctness of every state decision."

Petitioner is by this action attempting to have the Federal Courts substitute their judgment with respect to the charges made in place of the direct and proper appellate procedures which were available to petitioner's decedent in the state reviewing courts, and which were voluntarily abandoned. See *Wise* v. *City of Chicago*, 36 Ill. App. 196, 198, 183 N. E. 2d 538 (1962). Such a procedure would indeed "set the Federal Courts up as an arbiter of the correctness of every state decision," which surely could not have been the intent of the Congress in having enacted the Civil Rights Statutes.

C. *The Complaint As Amended Was Properly Dismissed*

The dissatisfaction of the Plaintiff with the orders of the Municipal Court, the District Court and now the Circuit Court of Appeals is not against Defendants but the courts. The Circuit Court of Appeals found no error by the District Court and it is earnestly submitted this Court will find no errors were committ d by the Circuit Court of Appeals.

Petitioner's contention that the Municipal Court lost jurisdiction to enter the order of commitment by reason of "perfection" of her appeal (Pet. 21), is a misconception of the law of Illinois. Section 76(2) of the Illinois Civil Practice Act, App. X, page 18 *infra*, provides that once a notice of appeal is filed in the Municipal Court, it is "perfected" to the extent only that no other step is jurisdictional and that the appeal may not be dismissed without notice. Under Illinois Law, it is well established that the mere filing of a notice of appeal does not suspend the operation of a judgment pending the appeal in the absence of a supersedeas. *First Nat'l Bank* v. *Road Dist. No. 8*, 389 Ill. 156, 159-60, 68 N.E. 2d 884 (1954); *Casey* v. *McGuire*, 321 Ill. App. 308, 52 N.E. 2d 822 (1944); *People ex. rel. Dilks* v. *Board of Education*, 283 Ill. App. 378, 391 (1936). To have had the notice of appeal operate as a supersedeas, Section

82(1) of the Illinois Civil Practice Act, App. X *infra*, page 18, required that petitioner's decedent give and file a supersedeas bond. This he did not do.

Petitioner seeks to convince this Court that her decedent applied for a supersedeas bond (Pet. 22), an allegation made in her Petition, but not in her complaint, original or as amended. Assuming, however, for the sake of argument, that the decedent had done so, it seems clear that the Appellate Court of Illinois, to which application was allegedly made (Pet. 22), would necessarily have had to consider the entire procedure taken in the Municipal Court leading to decedent's commitment and that it was of the opinion that this procedure was proper. If the application for a supersedeas bond had in fact been made in compliance with the statute, the bond would have had to have been allowed, with the Appellate Court only given the discretion as to fixing the amount and terms thereof. Ill. Rev. Stat. 1961, ch. 110, par. 82(1), App. X *infra* page 18. Further, the City of Chicago had the legal right to enforce the judgment until a supersedeas bond was filed. This Wise did not do. Petitioner's contention that her decedent applied for such a bond is not only *d'hors* the record, but defies both logic and law.

Petitioner's assertion that the Municipal Court was without jurisdiction to enter its order of commitment by reason of Section 68.1(3) of the Illinois Civil Practice Act App. X *infra* page 17, is a further misconception of the law inasmuch as the execution upon a judgment is not a post-trial motion such as is governed by Section 68.1(3).

Petitioner contends in the Amended Complaint that respondents "induced" the Municipal Court trial judge to enter the order of committment which he was without jurisdiction to enter (Add'l App. viii). The issue of the

propriety of that order was the subject matter of petitioner's decedent's appeal to the Illinois Appellate Court, Docket Number 48296, which decedent's Counsel (the same Counsel representing Petitioner here), voluntarily abandoned and which was dismissed on January 24, 1961. See *Wise v. City of Chicago*, 36 Ill. App. 2d 196, 198, 183 N.E. 2d 538 (1962). Having abandoned a direct attack upon this order, Petitioner in this action attempts to attack the judgment and orders of the Municipal Court of Chicago indirectly in the Federal Courts and seeks to avoid the defense of *res adjudicata* and the prohibition against collateral attacks upon judgments. The transparency of Petitioner's tactics and the underlying reasons therefore are patent. The jurisdiction of the Municipal Court of Chicago to enter the order of commitment is clear.

This Court stated in *Conley* v. *Gibson*, 355 U.S. 41, 54, that in appraising the sufficiency of a complaint it follows "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." This is just such a case as the petitioner cannot prove any set of facts under her complaint, as amended, which would entitle her to damages against the City or the public prosecutor defendants herein.

The Plaintiff was allowed to file an Amended Complaint herein (App. 76-77, and Add. Appx.), and the extraordinary consideration given by the District Court to the Complaint and Amended Complaint over a 5 month period of time is set forth clearly and at length in the record (App. 77-78, 88-89). This record demonstrates that the District Court gave Petitioner a fair and careful hearing and arrived at a correct decision. The Court of Appeals opinion reveals like care and study of the Amended Complaint. This extensive study by these Courts merely accentuates the facts

quite clearly that all the Corporation Counsel and his assistant did was to perform their official duty by bringing the deceased landlord before the Municipal Court to hear the charges of violation of the Chicago Building Code, and all action against the deceased then and thereafter was pursuant to Court decisions and orders. The Complaint, original or amended, states no claim upon which relief could be granted against these public prosecutor defendants or the City of Chicago as a defendant, and it was therefore properly dismissed.

Conclusion

The decision of the Circuit Court of Appeals was in all respects correct and in accord with the decisions of this Court. There is no conflict of authority, nor any substantial Federal question raised by the Petition herein. The Petition for the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit should therefore be denied.

Respectfully submitted,

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APPENDIX X

I. FEDERAL RULES OF CIVIL PROCEDURE

Rule 5. Service and filing of pleadings and other papers.

. . . .

(e) **Filing with the court defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Rule 7. Pleadings Allowed; Form of Motions.

. . . .

(b) **Motions and other papers.**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Rule 15. Amended and supplemental pleadings.

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleadings is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within

10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 75. Record on appeal to a Circuit Court of Appeals.

. . . .

(g) **Record to be prepared by clerk—necessary parts.** The clerk of the district court under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings or fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification.

II. CIVIL RIGHTS ACT (42 U.S.C.)

Section 1983. **Civil action for deprivation of rights.**

Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Section 1979.

III. ILLINOIS REVISED STATUTES

Section 1-2-9 (1961) Chapter 24, **Summons—Warrant—Punishment for violation of ordinance.**

In all actions for the violation of any municipal ordinance, the first process shall be a summons or a warrant. A warrant for the arrest of an accused person may issue upon the affidavit of any person that an ordinancee has been violated, and that the person making the complaint has reasonable grounds to believe that the party charged is guilty thereof. Evefy person arrested upon a warrant, without unnecessary delay, shall be taken before the proper officer for trial.

The person upon whom any fine or penalty is imposed, upon the order of the court or magistrate before whom the conviction is had, may be committed to the county jail as provided in Section 11-3-2 or to any place provided by ordinance for the incarceration of offenders until the fine, penalty, and costs are fully paid. No imprisonment, however, shall exceed 6 months for any one offense.

The corporate authorities may provide by ordinance that every committed person shall be required to work at whatever labor his strength permits, within and without the place of incarceration, not to exceed 10 hours each working day. The committed person shall be allowed, exclusive of his board, a credit of 50 cents for each day's work on account of the fine, penalty and costs.

Section 68.3 (1961) Chapter 110, **Motions after decree or judgment in non-jury cases.**

(1) In chancery cases and in cases at law tried without a jury, any party may, within 30 days after the entry of the degree or judgment, file a motion for a rehearing, or a retrial, or modification of the decree or judgment or to vacate the decree or judgment or for other relief. Neither the filing of nor the failure to file a motion under this section limits the scope of review.

Section 76(2) (1961) Chapter 110, **Limitation of review—Perfection of appeal.**

(2) An appeal is perfected when the notice of appeal is filed in the lower court. After being perfected no appeal shall be dismissed without notice, and no step other than that by which the appeal is perfected is jurisdictional.

Section 82(1) (1961) Chapter 110, **Appeal—Supersedeas—Bond—Stay and recall of mandate.**

(1) An appeal to the Appellate or Supreme Court operates as a supersedeas only if and when the appellant, after notice, gives and files a bond in a reasonable amount, to secure the adverse party. If the bond is given before the record is filed in the reviewing court, the amount and terms thereof shall be fixed and the security approved by the trial judge or his successor, or where that is impossible because of his absence from the district, sickness or other disability then by any other judge of the court, and the bond shall be filed in that court. If the bond is given after the record is filed in the reviewing court, the amount and terms thereof shall be fixed and the security approved by the reviewing court or any judge thereof in vacation, and the bond shall be filed in the reviewing court. If the appeal is from a judgment or decree for the recovery of money, the condition of the bond shall be for prosecution of the appeal and the payment of the judgment, interest, damages and costs in case the judgment is affirmed. In all other cases the condition shall be fixed with reference to the character of the judgment, order or decree appealed from. After the record is filed in the reviewing court, that court or any judge thereof in vacation upon motion may change the amount or terms or the security of the bond whether fixed by it or by the trial judge, and failure to comply with the order of the reviewing court or judge shall terminate the supersedeas. If notice of appeal is filed within 20 days after the entry of the order, determination, decision, judgment or decree complained of, and if bond is given, filed and approved within 30 days after the

entry, or within any further extended time allowed by the trial or reviewing court within the 30 day period or any extensions thereof, the notice of appeal, upon the approval of the bond, operates as a supersedeas. Unless the parties so stipulate no single extension or aggregate of extensions by the trial court shall exceed 45 days. After the expiration of the 30 day period or proper extensions thereof, no appeal operates as a supersedeas except upon order of the reviewing court or a judge thereof in vacation.

IV. MUNICIPAL CODE OF CHICAGO AS AMENDED

Section 24 5.- It shall be the duty of said superintendent to receive into the house of correction such persons as may be committed thereto by any court or magistrate in the county authorized to commit prisoners to such house of correction by the laws of the state or by any ordinance of the city, or any town or village in the county having a contract with the city for the care of its prisoners, and to put each of such persons so committed as are able to labor to the work which they are respectively best able to do, not to exceed eight hours for each working day.

The superintendent shall also receive into said house of correction any person who may be sentenced or committed thereto by any court or magistrate in and of the county, when such commitment is for a time not less than thirty days, under any agreement to that effect between the city and the board of commissioners of the county.